

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF LABOR STANDARDS ENFORCEMENT

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IN REPLY REFER TO:

January 14, 1987

This is in reply to your letter of December 19, 1986, and your telephone conversation with my deputy, Al Reyff, requesting an opinion concerning Contel Service Corporation's vacation plan in view of the Suastez decision and our Interpretive Bulletin No. 86-3*.

The following is my opinion concerning the application of your firm's vacation plan as described in your letter.

- a. & b. Based on the wording of your current plan, the Division would find that persons who are hired between January 2 and the end of the year would be entitled to a pro rata share of one week's vacation pay if they were to terminate prior to December 31. In other words, we would find that your agreement provides one week for the first year of employment or a fraction thereof. The problem we have concerns the overly-lengthy cutoff dates that determine if an employee earns vacation regardless of the time worked whereas the Suastez decision states that vacation accrues continuously.
- c. Based on the analysis set forth above, the conditions set forth in c. would be violative of the Suastez decision. These employees would accrue vacation as they work and, once vacation has accrued, it cannot be forfeited. In other words, employees who work during their second year would be entitled to a pro rata share of two weeks' pay.

*The above referred "Interpretive Bulletin" may not be valid. Refer to discussion of Interpretive Bulletins at page 2 section 0.1.4.3 of the Policies and Interpretations Manual.

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- d. The restrictions under d. would also be violative of Suastez as an employee would be losing vacation accrued during the year if it were not taken. Giving employees the option to exchange vacation pay for other employee benefits would not effect the right to accrued vacation pay even if there are IRS regulations controlling the amounts that can be used to acquire other employee benefits. These problems can be obviated by requiring employees to take their vacation before the end of the year or paying employees for any unused vacation.

The difficulties we see with the company's policy in relationship to California Labor Code Section 227.3, the Suastez decision and our interpretive bulletin are:

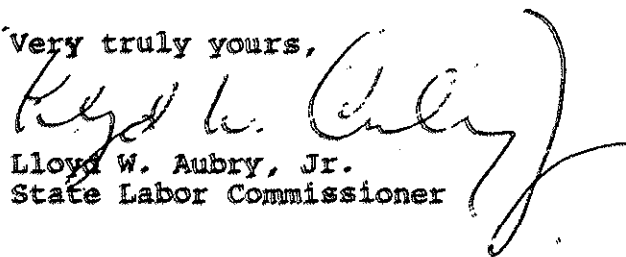
1. The arbitrary qualifying dates during the first year of employment are too long and unreasonably disqualify persons from accruing vacation pay because of the time of hire in the calendar year.
2. The advancing of vacation on a specific date, with the understanding that the vacation would be earned during the year and then placing forfeiture restrictions if an employee terminates prior to completion of a certain period, violates the "use it or lose it" provisions of the Suastez memo. Even if there is a policy of granting vacation on a prospective basis, the right to vacation or pay in lieu, thereof accrues as the employee earns the vacation.

It is my suggestion to design your policy to permit vacation after specific lengths of service with the condition that employees who terminate would receive the pro rata share of the vacation schedule that applies to them. A plan of this type would avoid the possible problems with the practice of advancing vacation noted above (see also Interpretive Bulletin No. 86-3, paragraph 7, footnote 2), but would not preclude the practice if instituted in accordance with the guidelines in the Suastez memo.

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I hope this is responsive to your questions; if not,
please let me know.

Very truly yours,


Lloyd W. Aubry, Jr.
State Labor Commissioner

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Enc.

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